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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LARRY A. TUCKER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

HAMILTON P. FOX, III
(Counsel of Record)
WILLIAM BLUMENTHAL
THOMAS M. DUGARD
SUTHERLAND, ASBILL & BRENNAN
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 383-0100

Counsel for Petitioner

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PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

1. Whether a potential use of hearsay that was specifically contemplated and consciously rejected in the design of the Federal Rules of Evidence may be resurrected and made admissible by the residual exception of Rule 804(b)(5).

2. Whether the admission at trial of hearsay testimony of a deceased accomplice given before a grand jury pursuant to an immunity agreement violated the Confrontation Clause of the Sixth Amendment.

3. Whether Federal Rule of Evidence 804(b)(5) authorizes the admission at trial of hearsay testimony of a deceased accomplice given before a grand jury pursuant to an immunity agreement.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Larry A. Tucker hereby petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The opinion of the Court of Appeals (App. *infra*, 1a-6a) is not reported.

JURISDICTION

The judgment of the Court of Appeals as to which review is sought was entered on March 11, 1992. On May 22, 1992, the Chief Justice granted an extension of time to and including July 9, 1992, within which to file a petition for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL PROVISION AND FEDERAL RULE OF EVIDENCE INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

Rule 804(b)(5) of the Federal Rules of Evidence provides in pertinent part:

> **(b) Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . .
>
> **(5) Other exceptions.** A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

STATEMENT

Petitioner is a banker and former West Virginia State Senator who pled guilty on September 11, 1989 to a one-count information charging a violation of the Hobbs Act, 18 U.S.C. § 1951(b)(2) (1988). The terms of petitioner's plea agreement required him to cooperate with investigative authorities by testifying truthfully before a federal grand

jury and by providing truthful information about his prior financial dealings to Special Agent Charles Little of the Internal Revenue Service. (C.A. App. 336-39[1]) Prior to disposition, petitioner was interviewed by Agent Little and an Assistant United States Attorney on approximately three occasions. (C.A. App. 339-48) He testified before the grand jury on two occasions. (*Id.*)

During the course of the interviews and testimony, petitioner was asked whether he had received payments from any source, particularly from nursing home interests, that were not reflected on his income tax return. (C.A. App. 339-48) He replied that all money received from nursing home interests was reflected on his return. Federal agents also asked petitioner about the source and manner of funds used to repay certain business debts. Finally, Agent Little asked petitioner whether he had engaged in any improper financial transactions as a legislator, other than the acts that had given rise to the Hobbs Act charge. Petitioner replied that he had not. (C.A. App. 200)

Some time after the plea to the Hobbs Act charge, the government began an investigation into the tax treatment of certain transactions in which petitioner had participated with nursing home interests. In connection with the investigation, the government obtained testimony from Cecil Nichols, the co-owner of the nursing home construction firm of Continental Health Care and a participant in a set of transactions that were a focus of the investigation. Nichols testified before a grand jury on January 9, 1990. (C.A. App. 33) Nichols entered into an immunity agreement with the United States Attorney's Office on February 1, 1990, and testified again before the grand jury that day. (C.A. App. 67, 102)

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[1] All materials that were submitted in the joint appendix to the United States Court of Appeals for the Fourth Circuit are cited herein as "C.A. App.".

On April 12, 1990, the grand jury returned an Indictment charging two counts of violating the Internal Revenue Code, one count of making a false statement to a grand jury, and one count of perjury. (C.A. App. 1) A Superseding Indictment was returned on June 21, 1990, which charged the same four counts as the earlier indictment, as well as two counts of obstruction of justice. On July 27, 1990, the district court granted petitioner's motion to compel performance of his plea agreement and dismissed the two tax counts. (C.A. App. 85) A second Superseding Indictment reinstating the dismissed tax counts was returned by another grand jury on October 10, 1990, and this Indictment was consolidated with the first Superseding Indictment. (C.A. App. 1) Once again, the district court dismissed the two tax counts on the same grounds as the earlier dismissal. (C.A. App. 89-92) The matter then proceeded to a jury trial on December 4, 1990. The jury was presented with four counts: (1) Making a False Statement to a Federal Grand Jury, in violation of 18 U.S.C. § 1623 (1988); (2) Obstruction of Justice, in violation of 18 U.S.C. § 1503 (1988); (3) Perjury, in violation of 18 U.S.C. § 1621 (1988); and (4) Obstruction of Justice, in violation of 18 U.S.C. § 1503 (1988).

In the interim, Cecil Nichols had died. On June 8, 1990, the government filed a Notice of Intent to Introduce Nichols' grand jury testimony pursuant to Fed. R. Evid. 804(b)(5). (C.A. App. 31) On July 6, counsel for petitioner filed a Motion in Limine seeking to prohibit the use of Nichols' grand jury testimony as substantive evidence at trial. (C.A. App. 81-83) At a July 23 hearing on pretrial motions, the court deferred ruling on the government's request to use Nichols' grand jury testimony. (C.A. App. 85) On November 26, the first day of trial, the court ruled that Nichols' grand jury testimony was presumptively admissible subject to a showing by the government that the contents were more probative on the point for which it was offered than any other evidence that the government

could reasonably produce. (C.A. App. 89) No evidentiary hearing was held to establish independently that Nichols' grand jury testimony was reliable. The court made no ruling regarding the reliability of the grand jury testimony. (C.A. App. 89, 107-12)

At trial, Nichols' grand jury testimony was admitted over the objection of defense counsel. The government made no showing of reliability (C.A. App. 138-39, 148-55), and the court noted only that testimony "before the grand jury has a degree of trustworthiness and reliability to it because it was under oath and being examined by a grand jury" (C.A. App. 150).

The admitted testimony contradicted petitioner's defense in connection with a transaction involving petitioner, Nichols, Continental Health Care, and a company called Fricks, Inc. Continental had hired petitioner, a licensed real estate broker, to assist it in locating property sites for a nursing home that Continental intended to construct. (C.A. App. 71, 261-63) Petitioner had also become an employee of Fricks, through which he intended to render services to Continental and receive compensation as a method for sheltering his income. (C.A. App. 282-85) In December of 1983, Nichols delivered to petitioner a check drawn on Continental's account in the amount of $75,000, which both petitioner and Continental recorded as a loan. (C.A. App. 259) In February or March of 1984, Continental hired petitioner as a consultant. (C.A. App. 261-63) On April 12, 1984, petitioner delivered to Nichols a personal check payable to Continental in the amount of $75,000 as repayment of the loan. (C.A. App. 320) On that day, he also presented Nichols with an invoice from Fricks in the amount of $100,000 for services rendered by petitioner, and Continental paid $75,000 in partial payment thereof. (C.A. App. 321) Petitioner testified that he believed in good faith that this arrangement was in compliance with the tax laws and testified before the grand jury that all

of his income had been properly reported. He told the same thing to Agent Little.

Nichols' grand jury testimony characterized the transaction differently. Nichols testified before the grand jury that Continental had hired petitioner sometime in 1983 (C.A. App. 71) and that the check for $75,000 delivered to petitioner in December 1983 was compensation to petitioner for what Nichols believed were services rendered to Continental. (C.A. App. 72) He further testified that in April 1985[4] petitioner delivered a personal check to Continental in the amount of $75,000 and asked Nichols to "switch checks" with him by paying the $75,000 to Fricks rather than to petitioner. (C.A. App. 74) Nichols believed that petitioner owed Fricks money and that petitioner wished to structure the transaction in this manner for tax purposes. (C.A. App. 74) The government maintained that the admitted testimony established that petitioner had not fully and properly reported his income and that petitioner had thus testified untruthfully to the grand jury and provided false information to Agent Little.

On December 7, 1990, the jury returned a verdict of guilty on Counts 1 and 2 and not guilty on Counts 3 and 4. (C.A. App. 9) On March 18, 1991, petitioner was sentenced to a term of imprisonment of 37 months, supervised release of two years, a fine of $45,000, and a special assessment of $100. The Order reflecting the judgment was entered on March 19, 1991. (C.A. App. 95-99) Bond pending appeal was denied.

On March 22, 1991, petitioner filed a Notice of Appeal. (C.A. App. 100-01) Argument was heard before the United States Court of Appeals for the Fourth Circuit on February 6, 1992. On March 11, 1992, the court affirmed the

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[4] Though Nichols testified that this payment was made in April *1985*, he almost certainly meant April *1984*, and there was no dispute that 1984 was the correct year.

decision of the district court, relying on its decision two months earlier in *United States v. Ellis*, 951 F.2d 580 (4th Cir. 1992), *cert. denied*, 60 U.S.L.W. 3873 (U.S. June 30, 1992) (No. 91-1663). Despite the absence of an evidentiary hearing to establish reliability of the prior testimony, the court held that "Nichols' statements exhibit indicia of trustworthiness sufficient for purposes of the Confrontation Clause." (App. 6a) It reasoned that:

> Nichols testified before the grand jury pursuant to an immunity agreement which he had voluntarily entered under advice from his attorney and which required him to give truthful statements regarding his dealings with [petitioner]. Nichols' attorney was present outside the courtroom at the time of the grand jury proceedings, and Nichols was afforded the opportunity to confer with his attorney at any point during his testimony. Nichols, no doubt, understood from the nature of the grand jury proceedings that the information contained in his testimony would be the subject of further investigation. The United States Attorney could have revoked Nichols' grant of immunity were it discovered that Nichols testified falsely. Because Nichols' statements before the grand jury were under oath, false testimony could have subjected Nichols to prosecution under 18 U.S.C. § 1623.

App. 5a.

An application for an extension of time within which to file a petition for a writ of certiorari was timely filed (*see* Application No. A-886), and on May 22, 1992, the Chief Justice signed an order extending the time to and including July 9, 1992.

REASONS FOR GRANTING THE PETITION

This Court has recently rejected the government's effort to read the Confrontation Clause narrowly so as to restrict its role in controlling the admission of hearsay testimony. The fundamental right protected by the Confrontation Clause, under even the most restrictive interpretation of the Sixth Amendment, is to prohibit the admission of a hearsay statement "where the statement sought to be admitted was in the character of an *ex parte* affidavit, *i.e.*, where the circumstances surrounding the out-of-court statement's utterance suggest that the statement has been made for the principal purpose of accusing or incriminating the defendant." *White v. Illinois*, 112 S. Ct. 736, 740-41 (1992). That fundamental right has been grotesquely violated by the government's prosecution of petitioner based on the admission of hearsay statements of a dead witness.

In contrast to the jurisprudence of the bulk of the other circuits, in the Fourth Circuit a person can be convicted on the basis of testimony given by an immunized co-conspirator, under the guidance of the prosecutor, before a grand jury, with no opportunity for the defendant to cross-examine his accuser or for the petit jury to make a credibility assessment. The factors deemed by the Fourth Circuit to be badges of reliability—a grant of immunity and testimony before a grand jury under oath—have not been viewed as indicators of credibility by other circuits. Other circuits have more properly viewed the grant of immunity and the grand jury setting as undermining credibility, and have found the presence of an oath irrelevant to the determination of credibility. A witness who seeks immunity has a motive to fabricate in order to curry favor with the prosecutor. The grand jury is an accusatory body controlled by the petitioner's adversary, the prosecutor, who has no interest or obligation to expose weaknesses in his/her case. Basically, the Fourth Circuit takes the position that not only do dead men tell no lies, but that dead men

told no lies while they were alive, provided that they were immunized grand jury witnesses.

The Fourth Circuit's approach conflicts with the other circuits. It conflicts with the principles enunciated recently by this Court in *United States v. Salerno*, 60 U.S.L.W. 4650 (U.S. June 19, 1992) (No. 91-872). And it conflicts with the fundamental principles of the Confrontation Clause as interpreted by this Court. If the Confrontation Clause means anything, it must mean that crucial testimony cannot be offered through the hearsay statements of dead witnesses whom the defendant never had the opportunity to confront nor the jury to see.

1. The admission into evidence of out-of-court statements of an unavailable witness deprives a defendant of the "most effective way to ascertain truth." *Watkins v. Sowders*, 449 U.S. 341, 349 (1981); *see also* 5 John H. Wigmore, *Evidence in Trials at Common Law* § 1367, at 32 (Chadbourn rev. 1974) ("[Cross examination] is beyond any doubt the greatest legal engine ever invented for the discovery of truth."). In the present case, petitioner was deprived of his right to cross-examine a crucial witness against him. Un-cross-examined statements are usually inadmissible under the Federal Rules of Evidence's prohibition against hearsay. Fed. R. Evid. 802.

The hearsay rules are "generally designed to protect similar values" as the Confrontation Clause—that is, a defendant's right to cross-examine adverse witnesses. *California v. Green*, 399 U.S. 149, 155 (1970). The primary justification for the general statutory rule prohibiting hearsay is the danger resulting from the litigant's lack of opportunity to test the trustworthiness and accuracy of statements of an absent declarant by cross-examination. *Anderson v. United States*, 417 U.S. 211, 220 (1974). Underlying the prohibition of hearsay is the theory that "the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of

a witness can best be brought to light and exposed, if they exist, by the test of cross-examination." *Idaho v. Wright*, 497 U.S. 805, 110 S. Ct. 3139, 3149 (1990) (quoting Wigmore, *supra* § 1420, at 251); Wigmore, *supra* § 1362, at 3 (hearsay rule is "a rule rejecting assertions, offered testimonially, which have not been in some way subjected to the test of cross-examination"); *see also Bridges v. Wixon*, 326 U.S. 135, 177 (1945) ("the theory of the Hearsay rule is that an extrajudicial statement is rejected because it was made out of Court by an absent person not subject to cross-examination").

Hearsay is admissible only in circumstances where the testimony meets stringent tests of trustworthiness. Exceptions to the hearsay rules are provided for hearsay that is of such a "specified quality" that its admission is preferable to complete loss of the witness' evidence. *See* Fed. R. Evid. 804 advisory committee's note. These special categories of hearsay are enumerated in Rules 803 and 804. The "catch-all" or "residual" hearsay exception found in Rule 804(b)(5) allows the admission of hearsay only if it constitutes "a statement [that is] not specifically covered by any of the [other] exceptions but ha[s] comparable circumstantial guarantees of trustworthiness." *See United States v. Donlon*, 909 F.2d 650, 654 (1st Cir. 1990); *United States v. Zannino*, 895 F.2d 1, 7 (1st Cir.), *cert. denied*, 494 U.S. 1082 (1990); *United States v. Doerr*, 886 F.2d 944, 954 (7th Cir. 1989); *United States v. Bailey*, 581 F.2d 341, 346 (3d Cir. 1978).

Even if an out-of-court statement satisfies a hearsay exception, it does not follow that it is admissible in a criminal case. While the Federal Rules of Evidence apply to both civil and criminal cases, only criminal cases are also governed by the Confrontation Clause of the Sixth Amendment.

The Confrontation Clause "reflects the belief of the Framers . . . that confrontation was a fundamental right es-

sential to a fair trial in a criminal prosecution." *Pointer v. Texas*, 380 U.S. 400, 404 (1965); *see also Kirby v. United States*, 174 U.S. 47, 55-56 (1899) (right of confrontation is "one of the fundamental guarantees of life and liberty," and "a right long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the Constitution of the United States and in the Constitutions of most, if not of all, the States composing the Union"). This Court has observed that "[t]here are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in the expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Lee v. Illinois*, 476 U.S. 530, 540 (1986) (quoting *Pointer v. Texas*, 380 U.S. 400, 405 (1965)).

The Confrontation Clause contains a specific right of cross-examination. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987) ("The Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination."); *United States v. Owens*, 484 U.S. 554, 557 (1988) ("[Right to confrontation] has long been read as securing an adequate opportunity to cross-examine adverse witnesses."); *Pointer v. Texas*, 380 U.S. 400, 406-07 (1965) ("a major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him"). This right of cross-examination "is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the 'accuracy of the truth-determining process.' It is, indeed, 'an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.'" *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (citations omitted).

"While a literal interpretation of the Confrontation Clause could bar the use of any out-of-court statements when the declarant is unavailable, this Court has rejected that view as 'unintended and too extreme.'" *Idaho v. Wright*, 110 S. Ct. 3139, 3145 (1990) (quoting *Bourjaily v. United States*, 483 U.S. 171, 182 (1987)); *see also Pointer v. Texas*, 380 U.S. 400, 407 (1965) (reversing state court decision to admit un-cross-examined preliminary hearing testimony of unavailable witness); *Mattox v. United States*, 156 U.S. 237, 243 (1895) (affirming admission at trial of testimony of two deceased witnesses given at prior trial). *Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980) sets forth a "general approach" for determining in criminal cases whether hearsay admissible under the Federal Rules of Evidence also meets the requirements of the Confrontation Clause. An absent declarant's statement is admissible

> only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

448 U.S. at 66 (citations omitted); *accord Idaho v. Wright*, 110 S. Ct. at 3146. An absent declarant's statement that does not fall within a firmly rooted hearsay exception is "presumptively unreliable and inadmissible for Confrontation Clause purposes." *Id.* at 3148 (quoting *Lee v. Illinois*, 476 U.S. 530, 543 (1986)).[3]

It is particularly ironic that, in this case, the government vouches for Nichols' credibility because his testimony was given before the grand jury and pursuant to a grant of

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[3] *Wright* held that Rule 804(b)(5) is not a firmly rooted hearsay exception, and therefore, any hearsay admitted under that rule must bear "particularized guarantees of trustworthiness" to pass constitutional muster. 110 S. Ct. at 3147-48. Nichols' testimony was admitted under Rule 804(b)(5).

immunity. The very testimony of petitioner that gave rise to his false statement conviction was likewise given before the grand jury and pursuant to a plea agreement. Although the government contends petitioner's testimony was false, by the standards it defends, this same testimony would be admissible hearsay in another case if petitioner had been unavailable.[4] Indeed, if petitioner had predeceased Nichols, petitioner's grand jury testimony, which provided the basis for his false statement conviction, would have been admissible hearsay, presumptively reliable as a matter of law, as proof that Nichols had committed perjury.

2. The Fourth Circuit's holding in the instant case is inconsistent with the logic of this Court's recent decision in *United States v. Salerno*, 60 U.S.L.W. 4650 (U.S. June 19, 1992) (No. 91-872). *Salerno* involved the construction of Federal Rule of Evidence 804(b)(1), which provides for the admission of prior testimony of an unavailable witness only if the party against whom the testimony is offered at trial had an opportunity and motive to develop the testimony by direct, cross, or redirect examination. In *Salerno*, two immunized witnesses testified before a grand jury and exculpated the defendants. At trial the witnesses were deemed unavailable because of their assertion of the privilege against self-incrimination. The defense sought to offer their grand jury testimony. Although the government had been afforded the opportunity to examine the witnesses before the grand jury, the Court ruled that the testimony could not be admitted under Rule 804(b)(1) unless the defense first proved that the prosecution had a similar motive before the grand jury as it had at trial. 60 U.S.L.W. at 4651-52. The Court remanded for consideration of the question of motive.

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[4] The Fourth Circuit's rationale for ruling that Nichols' hearsay statement was admissible is quoted *supra* page 7. Everything the court said about Nichols' testimony is equally applicable to petitioner's grand jury testimony. Indeed, if one were to substitute petitioner's name for Nichols' name in the quotation, the statement would be equally valid.

Construing the requirements of the hearsay exceptions strictly, this Court recognized that Congress had generally prohibited the admission of hearsay and had "made a careful judgment as to what hearsay may come into evidence and what may not. To respect its determination, we must enforce the words that it enacted. . . . This Court cannot alter evidentiary rules merely because litigants might prefer different rules in a particular class of cases." *Id.* at 4651.

This Court's adherence to the literal terms of the hearsay exceptions is in stark contrast to the approach of the Fourth Circuit. Ordinarily, the admission of prior testimony of unavailable witnesses, such as Nichols, would have been governed by Rule 804(b)(1). In the instant case, however, the government could not have offered Nichols' testimony under that rule, for petitioner had had no opportunity to examine Nichols.[5] Instead, disregarding Congress' "careful judgment" as to the elements necessary for the admission of prior testimony, the Fourth Circuit's use of the catchall provision of Rule 804(b)(5) circumvents Rule 804(b)(1).

The Fourth Circuit's approach finds both support and rejection in the law of other circuits. *Compare United States v. Furst*, 886 F.2d 558, 573 (3d Cir. 1989) (the residual exception "is not limited in availability as to types of evidence not addressed in the other exceptions; [it] is also available when the proponent fails to meet the standards set forth in the other exceptions."), *cert. denied*, 493 U.S. 1062 (1990), *and United States v. Hitsman*, 604 F.2d 443, 447 (5th Cir. 1979) (document which could not be properly admitted under business record exception because

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[5] Moreover, had it been petitioner, and not the government, who had sought to offer Nichols' grand jury testimony, it is not even clear that it would be admissible. Under *Salerno*, the district court would have to have found that the prosecution's motive in questioning Nichols before the grand jury was similar to its motive at trial.

of unavailability of custodian of records was nonetheless properly admitted under residual exception), *with United States v. Thomas*, 919 F.2d 495, 498 (8th Cir. 1990) (Rule 804(b)(5) "does not come into play unless the proferred statement is 'not specifically covered by any of the foregoing exceptions.' "), *cert. denied*, 111 S. Ct. 2837 (1991). All of these decisions predated *Salerno*, however; a consistent treatment of hearsay testimony requires strict adherence to Rule 804(b)(1).

As a matter of interpretation, a residual rule should not be construed in a manner that swallows the elements of a more precise rule. As this Court wrote in *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974), "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Cf. Radzanower v. Touche, Ross & Co.*, 426 U.S. 148, 153 (1976) ("It is a basic principle of statutory construction that a statute dealing with a narrow, precise and specific subject is not submerged by a later enacted statute covering a more generalized spectrum.").

Those courts that would admit grand jury testimony under Rule 804(b)(5) not only subvert the purpose of Rule 804(b)(1), but also usurp the judgment made by Congress in Rule 805(b)(5)'s emphasis on

> "equivalent" circumstantial guarantees of trustworthiness. As one commentator asks: "if another section of rule 804(b) expressly states that the requisite guarantee of trustworthiness for former testimony is the opportunity for cross-examination, how can prior testimony not so tested ever be viewed as sufficiently trustworthy?" Burstein, *Admission of an Unavailable Witness' Grand Jury Testimony: Can It Be Justified?*, 4 Cardozo L. Rev. 263, 269 (1983).

United States v. Vigoa, 656 F. Supp. 1499, 1505 n.7 (D.N.J. 1987), *aff'd without pub. op.*, 857 F.2d 1467 (3d Cir. 1988).

See also Glen Weissenberger, *The Admissibility of Grand Jury Transcripts: Avoiding the Constitutional Issue*, 59 Tul. L. Rev. 335, 343-44 (1984) ("wherever a potential use of hearsay was specifically contemplated and consciously rejected in the Rules' overall design, it would pervert Congress' plan if the residual exceptions were allowed to resurrect that rejected class of hearsay and render it admissible in derogation of its intended exclusion elsewhere in the hearsay rules").

The Fourth Circuit's opinion in the instant case is inconsistent with these principles. According to the opinion, an immunized witness who testifies before a grand jury is presumptively so reliable and trustworthy that his hearsay statements are admissible even though the defense is given no opportunity to cross-examine. This represents a degree of trust that Congress was not prepared to embrace when it enacted the Rule 804(b) hearsay exceptions. It also represents a fact pattern that cannot be meaningfully distinguished from *Salerno*, except in a way that cuts against admission of Nichols' testimony. The witnesses in *Salerno* were immunized co-conspirators, as was Nichols. The witnesses in *Salerno* testified before the grand jury, as did Nichols. The only distinction in *Salerno* was that the party against whom the testimony was offered had had the chance to examine the witnesses. Petitioner here was never afforded that opportunity. Unless *Salerno* is to be facilely evaded, the position adopted by the Fourth Circuit cannot be permitted to stand.

This Court should grant certiorari in order to reconcile the treatment of Rule 804(b)(5) with *Salerno* and to resolve the inconsistency among the circuits on the use of the residual hearsay exception to subvert the more specific hearsay provisions.

3. The Courts of Appeals disagree on how the fact that a statement was made pursuant to a plea bargain or grant of immunity affects the trustworthiness of that statement.

The Fourth Circuit has consistently held that a witness testifying pursuant to a grant of immunity or a plea bargain is more likely than not to testify truthfully. *See United States v. Ellis*, 951 F.2d 580, 583 (4th Cir.) (affirming admission of hearsay statements of deceased witness because, among other things, statements made in accordance with plea agreement), *cert. denied*, 60 U.S.L.W. 3873 (U.S. June 30, 1992) (No. 91-1663); *United States v. West*, 574 F.2d 1131, 1135 (4th Cir. 1978) (affirming admission of grand jury testimony of deceased witness because "his interest in gaining favors to avoid further imprisonment gave him every incentive to be extremely accurate in his reports"); *see also United States v. Workman*, 860 F.2d 140, 143-46 (4th Cir. 1988) (tape-recorded statement of deceased co-defendant made pursuant to plea agreement was admissible under catchall hearsay exception), *cert. denied*, 489 U.S. 1078 (1989). The Ninth Circuit has also said that immunity makes hearsay more reliable. *Barker v. Morris*, 761 F.2d 1396, 1401 (9th Cir. 1985) (fact that counsel at preliminary hearing reminded witness that his grant of immunity did not cover perjury added to reliability of witness' preliminary hearing testimony, which was admitted at trial after the witness had died), *cert. denied*, 474 U.S. 1063 (1986). Both the Fourth and Ninth Circuit decisions suggest that those courts believe that since immunity and plea agreements require the witness to testify truthfully, persons giving testimony or statements pursuant to such agreements are more likely to be trustworthy, for fear of losing the "benefit of their bargain."

Contrary to the holdings of the Fourth and Ninth Circuits, several of the other circuits have held that the existence of a grant of immunity or a plea bargain indicates unreliability of the testimony, since "[w]hen immunity, plea agreements or even currying favor with the law enforcement officials is involved, there is substantial likelihood that the statement is self-serving." *United States v. Feldman*, 761 F.2d 380, 388 (7th Cir. 1985) (reversing admis-

sion of deposition testimony taken at earlier civil proceeding) (quoting *United States v. Turner*, 475 F. Supp. 194, 198 (E.D. Mich. 1978)). *Accord United States v. Gomez-Lemos*, 939 F.2d 326, 330 (6th Cir. 1991) (reversing because of admission of grand jury testimony); *United States v. Snyder*, 872 F.2d 1351, 1356 (7th Cir. 1989) (affirming admission of grand jury testimony); *United States v. Thevis*, 665 F.2d 616, 629 (5th Cir. 1982) (affirming admission of grand jury testimony); *United States v. Bailey*, 581 F.2d 341, 350 (3d Cir. 1978) (reversing admission of prior statement to government). These courts have implicitly recognized that, in an immunity or plea agreement, a prosecutor essentially "buys" the witness' testimony after a series of negotiations, and the "price" that a witness is able to exact for this testimony depends on the quality of the "product" that he can deliver. Thus, the witness has a strong incentive to improve the quality of his product by embellishing his testimony.[6] *See Thevis*, 665 F.2d at 629 (noting in *dicta* that grand jury testimony given under a grant of immunity might encourage a witness to "embellish" his story); *Bailey*, 581 F.2d at 350 (observing that since the statement was made during negotiations for reduction of charges, it was less reliable). Because the witness believes that his fate is tied to the value of his testimony, his self-interest, his perceived need to please the prosecutor, and his hope for leniency all undermine his credibility.[7] *See Gomez-Lemos*, 939 F.2d at 330 (observing that merely because the witnesses had entered into

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[6] *See generally* Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 Vand. L. Rev. 1, 10 (Jan. 1992); Note, *Accomplice Testimony Under Contingent Plea Agreements*, 72 Cornell L. Rev. 800, 802 (May 1987); William L. Osterhoudt, *Representing a Grand Jury Witness*, 16 Litig. No. 2, at 6, 9 (Jan. 1990); *see also* Andrew J. Levander, *Heading Off an Indictment*, 13 Litig. No. 1, at 14, 16 (Fall 1986) (prosecutors often inquire of defense counsel "Who can your guy give up?" or "Can your guy testify against Mr. X?").

[7] Stacey J. Moritz and Marcy R. Harris, *Cross-examining the Accomplice Witness*, 14 Litig. No. 1, at 31, 32 (Fall 1987).

plea agreements prior to their grand jury testimony "does not lessen the likelihood that they would want to curry favor with the government, avenge themselves, or spread the blame by implicating [the] defendant"); *Snyder*, 872 F.2d at 1356 (observing that "[t]estimony obtained through 'currying favor with the law enforcement officials' may indeed be self-serving and potentially unreliable").*

Several courts have similarly held that the absence of a grant of immunity or plea agreement makes a hearsay statement more reliable. *See United States v. Donlon*, 909 F.2d 650, 654 (1st Cir. 1990) (affirming admission of non-immunized grand jury testimony and observing that the fact that witness did not testify under a grant of immunity adds to the reliability of the testimony); *United States v. Vernor*, 902 F.2d 1182, 1188 (5th Cir.) (affirming admission of accomplice's statement to authorities and observing that the fact that witness did not enter into plea bargaining and did not give statements pursuant to a plea agreement added to reliability of statements), *cert. denied*, 111 S. Ct. 301 (1990); *United States v. Zannino*, 895 F.2d 1, 7 (1st Cir.) (affirming admission of previous trial testimony of deceased witness and observing that the fact that witness appeared without the protection of immunity added to reliability of testimony), *cert. denied*, 494 U.S. 1082 (1990); *United States v. Doerr*, 886 F.2d 944, 956 (7th Cir. 1989) (affirming admission of grand jury testimony and observing

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* In the present case, Nichols actually testified before the grand jury twice, the first time without immunity, and the second time pursuant to an immunity agreement. The tenor of his testimony noticeably changed from his first to his second appearance. Notably, his second testimony contradicts his first testimony in key areas, the second being much more favorable to the prosecutor's case. For example, Nichols' February 1 explanation of the petitioner-Continental Health Care-Fricks transaction and relationship (C.A. App. 72-75) was markedly different than his January 9 explanation (C.A. App. 57-64). In his January testimony, Nichols testified that Tucker did not work for any of Nichols' entities besides Continental (C.A. App. 56), but in February he directly contradicted that position (C.A. App. 76).

that fact that witness had not been granted immunity added to reliability of testimony).

One Court of Appeals appears to take an ambiguous position on this issue. On one occasion, the Eleventh Circuit found that the grand jury testimony of a witness was less reliable because of the absence of a grant of immunity. *United States v. Lang*, 904 F.2d 618, 623 (11th Cir.) (affirming district court's refusal to admit at trial grand jury testimony of unavailable witness), *cert. denied*, 111 S. Ct. 305 (1990). Because the witness had not been granted immunity, the court concluded that he had more reason to exaggerate the role of the defendant in the crime and downplay his own. *Id.* at 623-24. Only ten months before *Lang*, however, the Eleventh Circuit found that "the fact that [the witness] testified under a grant of immunity . . . suggests that his testimony is no more trustworthy than ordinary inadmissible grand-jury testimony." *United States v. Fernandez*, 892 F.2d 976, 983 (11th Cir. 1989) (finding admission of grand jury testimony was reversible error), *cert. dismissed sub nom. Recarey v. United States*, 495 U.S. 944 (1990).

This Court has itself recognized that an agreement in regard to future prosecution may engender unreliability in testimony. *Giglio v. United States*, 405 U.S. 150, 154-55 (1972) (because evidence of any understanding or agreement as to future prosecution would be relevant to witness' credibility, such evidence must be disclosed to the jury).

Most pattern and model jury instructions provide for a special instruction that cautions jurors to examine immunized testimony "with greater care than the testimony of an ordinary witness . . . [and to] consider whether the testimony may be colored in such a way as to further the witness's own interest, for a witness who realizes that he may procure his own freedom by incriminating another has a motive to falsify." 1 Edward J. Devitt and Charles

B. Blackmar, *Federal Jury Practice and Instructions* § 17.04, at 529 (3d ed. 1977); *see* Committee on Pattern Jury Instructions, District Judges Ass'n of the Sixth Circuit, *Pattern Criminal Jury Instructions*, Instruction 7.07, at 152 (1991 ed.) (jury should consider immunized testimony "with more caution than the testimony of other witnesses"); Committee on Model Jury Instructions, Ninth Circuit, *Manual of Model Criminal Jury Instructions for the Ninth Circuit*, Instruction 4.09, at 59 (1992 ed.) (jury should consider whether immunized testimony "may have been influenced by the government's promise of immunity given in exchange for it, and . . . should consider that testimony with greater caution than that of ordinary witnesses"); Committee on Pattern Jury Instructions, District Judges Ass'n, Fifth Circuit, *Pattern Jury Instructions—Criminal Cases*, Instruction 1.15, at 26 (1990 ed.) (testimony of immunized witness "must always be examined and weighed by the jury with greater care and caution than the testimony of ordinary witnesses"); Federal Judicial Center Committee to Study Criminal Jury Instructions, *Pattern Criminal Jury Instructions*, Instruction 24, at 32 (1982) (immunized testimony should be considered with more caution than other testimony, as immunized witness may have had reason to fabricate stories or exaggerate the conduct of others in order to strike a favorable bargain with the government for his case); *see also* Committee on Model Criminal Jury Instructions Within the Eighth Circuit, *Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit*, Instruction 4.04, at 88 (1989 rev. ed.) (whether immunized testimony was influenced by government's promise is for jury to decide).[9]

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[9] Practitioners also recognize the inherent unreliability of immunized testimony and indicate that such testimony is particularly vulnerable to damaging cross-examination. *See* Moritz and Harris, *supra*, 14 Litig. No. 1, at 32 (immunity and cooperation agreements are "grist for the cross-examiner's mill"); Osterhoudt, *supra*, 16 Litig. No. 2, at 9 ("Tac-

The Courts of Appeals have seized upon two conflicting views of the practical realities of the immunity and plea bargaining processes in developing their contradictory approaches to the trustworthiness issue. The Fourth, Ninth, and Eleventh (*Lang*) Circuits have determined that since provisions in immunity and plea agreements require the witness, as a condition to the immunity or leniency, to provide truthful information or testimony, the witness is less likely to be untruthful for fear of losing the benefit for which he bargained. Thus, they conclude that the existence of an immunity or plea agreement adds to the trustworthiness of the testimony or statements. In contrast, the First, Third, Fifth, Sixth, Seventh, and Eleventh (*Fernandez*) Circuits have determined that a witness who is testifying or being interviewed pursuant to an immunity or plea agreement is less concerned with telling the truth than with providing information that he believes will please the prosecutor. Thus, these circuits have concluded that the existence of an immunity or plea agreement renders testimony or statements less trustworthy. The Court should grant certiorari to resolve this disagreement among the circuits. Prosecutors rely heavily on testimony obtained pursuant to immunity and plea agreements, and the admission of this type of hearsay testimony implicates the fundamental rights to confrontation and cross-examination under the Sixth Amendment.

4. The circuits are also divided on whether testimony is more likely to be trustworthy if it is given before a grand jury and under oath. The Fourth Circuit held that Nichols' testimony was reliable because it was given before a grand jury and under oath. The First and Eighth Circuits have similarly held that such testimony is more likely to be trustworthy than other testimony. However, these de-

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tically, prosecutors prefer that their trial witnesses testify without any favors or inducements, such as immunity at the grand jury stage", since such favors make the witness more vulnerable to cross-examination).

cisions conflict with other Courts of Appeals' decisions holding that testimony is no more likely to be trustworthy if given voluntarily before a grand jury and under oath. Further, the Fourth Circuit's decision flies in the face of conventional wisdom that grand jury testimony, by its nature, is not necessarily more reliable than other out-of-court statements.

In *United States v. McCall*, the Fourth Circuit found that " 'accouterments' of grand jury proceedings, bolstered by corroborative trial evidence . . . can perform an equally protective role for the truth-finding process as do confrontation procedures." 740 F.2d 1331, 1342 (4th Cir. 1984) (reversing decision to admit at trial affidavit of unavailable witness). The Fourth Circuit stated that in three of its prior decisions the fact that the hearsay involved had been recorded in a grand jury proceeding, rather than some less formal proceeding, influenced the court's holding that the testimony was admissible under the Sixth Amendment. *McCall*, 740 F.2d at 1341 (citing *United States v. Murphy*, 696 F.2d 282 (4th Cir. 1982), *United States v. Garner*, 574 F.2d 1141 (4th Cir.), *cert. denied*, 439 U.S. 936 (1978), and *United States v. West*, 574 F.2d 1131 (4th Cir. 1978)). The Eighth Circuit in *United States v. Carlson* held that the unavailable witness' grand jury testimony possessed "strong indication[s] of reliability" because it was given under oath. 547 F.2d 1346, 1354 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977). In *United States v. Donlon*, the First Circuit similarly included the fact that grand jury testimony was given under oath as one of the factors that indicated the reliability of the testimony. 909 F.2d 650, 654 (1st Cir. 1990) (affirming admission at trial of grand jury testimony of unavailable witness).

Several other Courts of Appeals have held that the fact that a witness gives testimony under oath in the "relatively solemn setting" of a grand jury does *not* guarantee the trustworthiness of their statements implicating a defendant. *United States v. Gomez-Lemos*, 939 F.2d 326,

330 (6th Cir. 1991); *see also United States v. Fernandez*, 892 F.2d 976, 981 (11th Cir. 1989) (ordinary grand jury testimony not admissible under catchall hearsay exception, as oath alone is inadequate to meet the requirement of "equivalent circumstantial guarantees of trustworthiness"); *Tolbert v. Jago*, 607 F.2d 753, 756 (6th Cir. 1979) (Engel, Cir. J., concurring) (merely because testimony is under oath before a grand jury does not provide sufficient "guarantee of trustworthiness"). Because the grand jury is an *ex parte*, nonadversarial proceeding under the control of the prosecutor, the defendant is not afforded an opportunity to test any witness for his trustworthiness or any statement for its truthfulness or accuracy. *United States v. Snyder*, 872 F.2d 1351, 1355 (7th Cir. 1989) (that evidence was given before a grand jury adds little to its reliability, since neither defendant nor anyone on his behalf was present at the grand jury proceedings, there was no cross-examination, and ordinary rules of evidence did not apply; the oath did not markedly enhance the reliability of the testimony).[10] In the present case, Nichols' testimony was only tested in those instances when the prosecutor challenged testimony that was unfavorable to the government. (C.A. App. 57-64)[11]

Witnesses are keenly aware of what testimony the prosecutor wants to hear, and so they are under enormous pressure to conform. *See United States v. Gonzalez*, 559 F.2d 1271, 1273 (5th Cir. 1977) (given prosecutor's offer of immunity, the only civil or criminal liability witness could face is if he did not testify; thus, whether he told

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[10] *See* Jeffrey Cole, *Residual Exceptions to the Hearsay Rule*, 16 Litig. No. 1, at 26, 31 (Fall 1989); Thomas P. Sullivan and Robert D. Nachman, *If It Ain't Broke, Don't Fix It: Why The Grand Jury's Accusatory Function Should Not Be Changed*, 75 J. Crim. L. & Criminology 1047, 1049 (Winter 1984); Faust F. Rossi, *The Silent Revolution*, 9 Litig. No. 2, at 13, 18 (Winter 1983).

[11] One grand juror briefly questioned Nichols, but did not challenge any of his testimony. (C.A. App. 64)

the truth or not was incidental to what would happen to him if he did not say something); *see also* Jeffrey Cole, *Residual Exceptions to the Hearsay Rule*, 16 Litig. No. 1, at 26, 31 (Fall 1989). Since the formal rules of evidence do not apply to grand jury proceedings, prosecutors may employ leading and compound questions which often confuse the witness and distort the truth. *See Snyder*, 872 F.2d at 1355; *Gonzalez*, 559 F.2d at 1273; *United States v. Vigoa*, 656 F. Supp. 1499, 1506-07 (D.N.J. 1987) (suggestiveness of leading questions undermines the reliability of grand jury testimony), *aff'd without pub. op.*, 857 F.2d 1467 (3d Cir. 1988); *see also Fernandez*, 892 F.2d at 983 (fact that witness responded to "pregnant" questions put by the prosecutor suggested that his testimony was no more trustworthy than ordinary inadmissible grand jury testimony). Not only is the witness not cross-examined, but frequently his testimony is carefully scripted by the prosecutor. One prosecutorial technique is having the witness read a prepared statement and affirm its truth under oath. *See, e.g., United States v. Mitchell*, 777 F.2d 248, 263 (5th Cir. 1985) (affirming propriety of prosecutor's tactic of having witnesses appear before grand jury and simply adopt portions of a Drug Enforcement Agency report rather than present live testimony), *cert. denied*, 476 U.S. 1184 (1986). Another technique is having the prosecutor ask only leading questions, so that the prosecutor effectively testifies, with the witness assenting to the prosecutor's statements. This tactic is employed so that the witness will not make a "mistake." In the present case, the prosecutor frequently utilized leading questions during Nichols' second grand jury testimony, eliciting mostly yes-or-no answers from Nichols throughout the proceeding. (C.A. App. 71-79)

If the testimony of a government witness has "problem areas," a prosecutor will shape his examination to steer clear of those problems, if possible. Alternatively, the prosecutor may make the testimony so fuzzy that credibility

problems are masked. For example, having a witness give answers in the passive voice can disguise discrepancies between witnesses about who did a particular act or made a particular statement.[12] None of this can be exposed if the witness is not cross-examined. A prosecutor has no obligation or motive to cross-examine his/her grand jury witness or even to present exculpatory evidence to the grand jury. *See United States v. Williams*, 112 S. Ct. 1735, 1744-45 (1992). How then can grand jury testimony be deemed inherently reliable?[13]

This Court has found that "[t]he grand jury may not always serve its historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor . . . ." *United States v. Dionisio*, 410 U.S. 1, 17 (1973); *see also United States v. Mara*, 410 U.S. 19, 23 (1972) (Douglas, J., dissenting) ("It is, indeed, common knowledge that the grand jury, having been conceived as a bulwark between the citizen and the Government, is now a tool of the Executive.").

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[12] If witness A says that Jones made a particular statement, but witness B says it was Smith, the discrepancy can be papered over by having one or both witnesses testify that the statement "was made." A cross-examiner can follow up and expose the discrepancy that will remain hidden otherwise.

[13] Nichols' presumptively reliable testimony on the crucial Continental-petitioner-Fricks transaction was contradicted at trial by the testimony of Charles Comer, Continental's accountant. Nichols had testified at his second grand jury appearance that, to his knowledge, Continental never made a loan to petitioner. (C.A. App. 75) At trial, however, Comer testified that Nichols instructed him to code the December 1983 payment to petitioner as a loan, and Comer testified that he did so. (C.A. App. 142-43) The carbon copy of the check with the word "loan" entered on the stub was admitted into evidence. Comer further testified that Nichols instructed him to enter the payment on the books of Continental as a loan. (C.A. App. 143) It is impossible, of course, to prove what other contradictions may have been exposed in Nichols' testimony, had petitioner's lawyer been given the opportunity to cross-examine him.

By its reliance on the fact that Nichols' testimony was given before a grand jury under oath as an indicator of reliability, the Fourth Circuit espouses an approach that contradicts the holdings of other Courts of Appeals and ignores the realities of the grand jury system. The Court should grant certiorari to resolve the conflict between the Fourth Circuit and the other circuits concerning the effect of the grand jury dynamics on the reliability of testimony.

5. Though "the hearsay rules and the Confrontation Clause are generally designed to protect similar values," the two are not precisely congruent, and this Court has found on more than one occasion a violation of confrontation values even though the statements were arguably admissible under a hearsay exception. *California v. Green*, 399 U.S. 149, 155-57 (1970) (citing *Barber v. Page*, 390 U.S. 719 (1968) and *Pointer v. Texas*, 380 U.S. 400 (1965)). However, neither this Court, nor any of the Courts of Appeals has ever clearly outlined the distinction between the factors providing "circumstantial guarantees of trustworthiness"—the Rule 804(b)(5) test—and factors providing "particularized guarantees of trustworthiness"—the Confrontation Clause test.

This Court has twice addressed the meaning of "particularized guarantees of trustworthiness" in the context of statements admitted under Rule 804(b)(5). *Idaho v. Wright*, 110 S. Ct. 3139 (1990); *Lee v. Illinois*, 476 U.S. 530 (1986). In both cases, the Court determined that statements which were admissible under Rule 804(b)(5) lacked the "particularized guarantees of trustworthiness" required by the Confrontation Clause. *Lee* stated that the "truthfinding function of the Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination." 476 U.S. at 541. *Wright* further explained that " 'particularized guarantees of trustworthiness' must be shown from the totality of the circumstances, but we think the relevant circumstances

include only those that surround the making of the statement and that render the declarant particularly worthy of belief." 110 S. Ct. at 3148. In these cases, the Court only examined the statements for Confrontation Clause purposes, offering no insight into how the factors determining admissibility under 804(b)(5) might differ.

Several Courts of Appeals have addressed the admissibility of hearsay evidence under both the 804(b)(5) "circumstantial guarantee" standard and the Confrontation Clause "particularized guarantee" standard. The circuits have blurred any distinction that may exist between the two standards and have considered the same factors for both tests. In *United States v. Doerr*, 886 F.2d 944, 956-57 (7th Cir. 1989), the Seventh Circuit determined that the grand jury testimony at issue had the requisite "circumstantial guarantees of trustworthiness" and was properly admitted under Rule 804(b)(5), though the court cautioned that the evidence may still violate the Sixth Amendment. However, in its Confrontation Clause determination, the court summarily concluded that the requirement for "particularized guarantees of trustworthiness" was satisfied since the Rule 804(b)(5) test was satisfied. *Id.* at 958. The Fourth Circuit, in *United States v. West*, 574 F.2d 1131, 1136 (4th Cir. 1978), likewise found that grand jury testimony was admissible under Rule 804(b)(5), but noted that it was required to make a separate determination of admissibility focusing upon the Confrontation Clause. When it addressed the reliability of testimony under the Confrontation Clause, though, it stated that the considerations had been "canvassed" in the 804(b)(5) discussion, and it merely discussed the same factors. *Id.* at 1137-38. Other courts have simply stated outright that, though the standards are distinct and though reliability may not be inferred under a Sixth Amendment analysis merely because the prior testimony is admissible under Rule 804(b)(5), the factors to be considered in assessing the reliability of grand jury testimony under Rule 804(b)(5)

and the Confrontation Clause are the same. *United States v. Snyder*, 872 F.2d 1351, 1354-55 (7th Cir. 1989); *see also United States v. Lang*, 904 F.2d 618, 625 (11th Cir.) (same reasons that led court to find lack of trustworthiness for purposes of Rule 804(b)(5) indicated lack of sufficient indicia of reliability for Confrontation Clause purposes), *cert. denied*, 110 S. Ct. 305 (1990); *United States v. Zannino*, 895 F.2d 1, 7 (1st Cir.) (decision that statements are reliable under Confrontation Clause is dispositive of reliability under Rule 804(b)(5); expressly declined to answer whether the two standards are always the same), *cert. denied*, 494 U.S. 1082 (1990).

Though this Court has made clear that hearsay evidence admissible under Rule 804(b)(5) may nevertheless violate the Confrontation Clause, it is impossible to discern from either this Court's or the Courts of Appeals' decisions what would distinguish an admissible statement under 804(b)(5) from an inadmissible statement under the Confrontation Clause.[14] Since most cases involving the admission of hearsay evidence, including grand jury testimony, will implicate both Rule 804(b)(5) and the Confrontation Clause, the Court should grant certiorari to clarify the distinguishing factors between the admissibility tests under the two doctrines.

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[14] *Cf. White v. Illinois*, 112 S. Ct. 736, 744 (1992) ("The truth may be that this Court's cases unnecessarily have complicated and confused the relationship between the constitutional right of confrontation and the hearsay rules of evidence.") (Thomas, J. and Scalia, J., concurring).

CONCLUSION

The petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED,

HAMILTON P. FOX, III
(Counsel of Record)
WILLIAM BLUMENTHAL
THOMAS M. DUGARD
SUTHERLAND, ASBILL & BRENNAN
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 383-0100

Counsel for Petitioner

July 9, 1992

APPENDIX

United States Court of Appeals,
Fourth Circuit

No. 91-5283

UNITED STATES of America,
Plaintiff-Appellee,

v.

Larry A. TUCKER,
Defendant-Appellant.

Argued: Feb. 6, 1992
Decided: Mar. 11, 1992

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. Charles H. Haden, II, Chief District Judge. (CR-90-82-2)

Arthur T. Ciccarello, Sr., Charleston, W. Va., argued (Michael J. Del Guidice and Thomas G. Casto, Charleston, W. Va., on the brief), for appellant.

Joseph F. Savage, Jr., Asst. U.S. Atty., Charleston, W. Va., argued (Michael W. Cary, U.S. Atty., Charleston, W. Va., on the brief), for appellee.

Before RUSSELL and SPROUSE, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Larry A. Tucker appeals his convictions under 18 U.S.C. §§ 1503, 1623 (1988), contending that the district court erred in admitting the grand jury testimony of a deceased witness at Tucker's trial.[1] Finding no error, we affirm the district court judgement.

I

Appellant Larry A. Tucker is a real estate broker and former President of the West Virginia Senate who pled guilty on September 11, 1989 to extortion under color of office in violation of the Hobbs Act, 18 U.S.C. § 195(b)(2)(1988). The terms of Tucker's plea agreement required Tucker to cooperate with investigative authorities by testifying truthfully before a federal grand jury and by providing truthful information about his prior financial dealings to Special Agent Charles Little of the Internal Revenue Service.

Tucker, however, testified falsely before the grand jury, and falsely represented to Special Agent Little, that he had properly reported on prior tax returns all the income that he had previously earned, including any income which he received from nursing home interests. Cecil Nichols, a principal of Continental Health Care ("CHC"), testified before a subsequent grand jury on January 9, 1990 that CHC paid Tucker $100,000 in 1984 as compensation for locating suitable sites in West Virginia for the construction of nursing homes. Through a ruse involving the deposit

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[1] Tucker raised other grounds for appeal in his brief. However, at oral argument, Tucker's counsel elected to confine the appeal solely to the issue of the district court's admission at trial of a deceased witness' grand jury testimony. We shall do likewise, and do not here consider the other issues raised in Appellant's brief. We are confirmed in this course by the opinion that none of the unargued issues has any merit.

of this $100,000 into an account ostensibly maintained by Fricks, Inc., an unprofitable business operated by one of Tucker's business associates, Tucker sought to conceal most of this $100,000 in income from the I.R.S. and to avoid payment of income tax thereon. Nichols testified before the grand jury that, at Tucker's request, CHC executed checks totalling $100,000 to Fricks, Inc.—rather than to Tucker personally—as payment for Tucker's services in locating sites for CHC nursing homes.

On June 21, 1990, Tucker was indicted for obstruction of justice in violation of 18 U.S.C. § 1503, and making false declarations before a grand jury in violation of 18 U.S.C. § 1623. Since Nichols was deceased by the time of Tucker's trial, the district court admitted Nichols' testimony before the grand jury regarding CHC's payments by check to Fricks, Inc. for Tucker's benefit. Tucker was convicted of both offenses on December 10, 1990.

II

Tucker argues that the district court violated his rights under the Sixth Amendment's Confrontation Clause by admitting Nichols' grand jury testimony at Tucker's trial. Tucker correctly observes that Nichols' statements before the grand jury are hearsay, which the district court admitted under the exception to the hearsay rule provided in Fed. R. Evid. 804(b)(5).[2]

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[2] Fed. R. Evid. 804(b)(5) permits admission of hearsay statements where the declarant is unavailable, the statement exhibits circumstantial guarantees of trustworthiness equivalent to those described in 804(b)(1) to -(b)(4), and

> the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will be best served by admission of the statement into evidence.

As this court recently observed in *United States v. Ellis*, "A two-part test determines whether 'incriminating statements admissible under an exception to the hearsay rule also meet the requirements of the Confrontation Clause.'" Nos. 90-5726, 91-5771, 1991 WL 260433, at *2 (4th Cir. Jan. 7, 1992) (quoting *Idaho v. Wright*, 110 S. Ct. 3139, 3146 [1990]). The prosecution must first show that the declarant was unavailable. *Id.* The prosecution must then show that the statements exhibit the requisite indicia of reliability. *Id.* The Supreme Court instructs that the reliability of the statements may be shown "in one of two ways: either by showing that the statements 'fall[] within a firmly rooted hearsay exception' or by showing that the statements bear sufficient guarantees of trustworthiness." *Ellis*, Nos. 90-5726, 91-5771, 1991 WL 260433, at *2 (4th Cir. Jan. 7, 1992) (quoting *Idaho v. Wright*, 110 S. Ct. 3139, 3147 [1990]).

Nichols was deceased by the time of Tucker's trial, and therefore unquestionably was unavailable to testify. We are left with the determination of the second part of the test recited in *Idaho*, 110 S. Ct. at 3147, *i.e.*, whether Nichols' statements exhibited indicia of reliability sufficient for purposes of the Confrontation Clause.[3]

In *United States v. Ellis*, Nos. 90-5726, 91-5771, 1991 WL 260433, at *2 (4th Cir. Jan. 7, 1992), this court found sufficient guarantees of the trustworthiness of a deceased witness' statements based upon these facts.

> First, [the witness] issued the statements voluntarily in the presence of two government agents and both of his attorneys. Second, [the witness] made the statements in accordance with

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[3] Since Fed. R. Evid. 804(b)(5) is not a traditional hearsay exception, *see, e.g., Ellis*, Nos. 90-5726, 91-5771, 1991 WL 260433, at *5 n.1 (4th Cir. Jan. 7, 1992), this issue is one of whether Nichols' statements showed sufficient guarantees of trustworthiness.

> a plea agreement which required him to be truthful with federal investigators. Third, the government agents were taking notes in the presence of [the witness] as the statements were made. Fourth, [the witness] could be deemed to know, in view of the plea agreement, that what he was saying would be the subject of further investigation—and confirmation—by the government. Fifth, though the plea agreement did not require him to do so, [the witness] agreed to record subsequent conversations with the individuals he had implicated . . . suggesting that he was wiling to have the truthfulness of these statements tested.

Id.

We find that similar circumstances exist here, and that Nichols' statements exhibit indicia of trustworthiness sufficient for purposes of the Confrontation Clause. Nichols testified before the grand jury pursuant to an immunity agreement which he had voluntarily entered under advice from his attorney and which required him to give truthful statements regarding his dealings with Tucker. Nichols' attorney was present outside the courtroom at the time of the grand jury proceedings, and Nichols was afforded the opportunity to confer with his attorney at any point during his testimony. Nichols, no doubt, understood from the nature of the grand jury proceedings that the information contained in his testimony would be the subject of further investigation. The United States Attorney could have revoked Nichols' grant of immunity were it discovered that Nichols testified falsely. Because Nichols' statements before the grand jury were under oath, false testimony could have subjected Nichols to prosecution under 18 U.S.C. § 1623.

We conclude for these reasons that Nichols' statements clearly met the requirements for trustworthiness adumbrated in *United States v. Ellis*, Nos. 90-5726, 91-5771,

1991 WL 260433, at *2 (4th Cir. Jan. 7, 1992), and we accordingly affirm the decision of the district court.

AFFIRMED

Supreme Court, U.S.
FILED
SEP 9 1992
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No. 92-64

In the Supreme Court of the United States

OCTOBER TERM, 1992

LARRY A. TUCKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

LOUIS M. FISCHER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether it violated the Federal Rules of Evidence or the Confrontation Clause of the Sixth Amendment to admit the grand jury testimony of a deceased witness at petitioner's trial.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is not reported, but the judgment is noted at 956 F.2d 1163 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 11, 1992. On May 22, 1992, the Chief Justice extended the time within which to file a petition for a writ of certiorari to July 9, 1992, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of West Virginia, petitioner was convicted of making a false statement to a grand jury, in violation of 18 U.S.C. 1623, and of obstructing justice, in violation of 18 U.S.C. 1503.[1] He was sentenced to 37 months' imprisonment, to be followed by two years' supervised release, and was fined $45,000. The court of appeals affirmed. Pet. App. 1a-6a; Gov't C.A. Br. 3.

1. Petitioner was a real estate broker and former president of the West Virginia State Senate. In September 1989, petitioner pleaded guilty pursuant to a plea agreement to a one-count information charging him with violating the Hobbs Act, 18 U.S.C. 1951 (b)(2). Petitioner's plea agreement required him to cooperate with investigative authorities and to testify truthfully before a federal grand jury. In November and December 1989, petitioner testified before the grand jury that, other than the $10,000 that formed the basis for his guilty plea, he had not received any income that he had failed to report on his income tax returns. In particular, he stated that he had reported all of the income he had received from nursing home interests. The grand jury also asked petitioner where he had obtained money that he used to repay a number of business debts; petitioner said he had obtained that money either from the sale of bank stock or from income on which he had already paid

[1] He was acquitted on one count of committing perjury (18 U.S.C. 1621) and one count of obstructing justice (18 U.S.C. 1503). In addition, prior to trial the district court dismissed counts charging petitioner with filing a false income tax return (26 U.S.C. 7206(1)), and with conspiracy to impede the IRS (18 U.S.C. 371).

taxes. Petitioner gave the same information to an IRS agent. Pet. App. 2a-3a; Gov't C.A. Br. 4-5; C.A. App. 203, 339-348.

Petitioner's testimony that he had correctly reported his taxable income, including income from nursing home interests, was false. Other evidence showed that petitioner had unreported income that he had concealed by routing it through a corporation operated by one of his associates. Pet. App. 2a-3a.

In January and February 1990, Cecil Nichols, co-owner of Continental Health Care (CHC), a nursing home construction firm, testified before a different grand jury. Prior to his second appearance, he was granted immunity. C.A. App. 70, 102-103. Nichols testified that CHC had given petitioner a $75,000 check in December 1983 for some of his work in locating suitable sites in West Virginia for the construction of nursing homes. According to Nichols, petitioner returned the $75,000 to CHC in 1985 and requested CHC to make out a new $75,000 check to Fricks, Inc., a business operated by petitioner's business associate. Petitioner did not report the $75,000 on his income tax returns. Pet. App. 2a-3a; Gov't C.A. Br. 5-6, 15; C.A. App. 218. In June 1990, petitioner was indicted on the instant false statement and obstruction of justice charges. Pet. App. 3a.

At petitioner's trial, Donald Tate, the owner of Fricks, confirmed that he had "laundered" money through a Fricks account for petitioner. Tate explained that, at petitioner's request, he set up an account through which petitioner could launder his funds. Tate said that the account was used only for that purpose; Fricks had separate accounts through which it conducted its own business. Gov't C.A. Br. 7-8.

Prior to petitioner's trial, Nichols died. The government moved to admit his grand jury testimony under the residual exception to the hearsay rule, Fed. R. Evid. 804(b)(5).[2] Petitioner argued that the admission of that evidence would violate the hearsay rule and his rights under the Confrontation Clause of the Sixth Amendment. The trial court rejected those claims and admitted the testimony. Pet. App. 3a.

2. On appeal, petitioner renewed his claim that the trial court erred in admitting Nichols' grand jury testimony. Relying on *United States* v. *Ellis*, 951 F.2d 580 (4th Cir.), cert. denied, 112 S. Ct. 3030 (1992), the court of appeals applied a two-part test to determine whether the district court had correctly admitted Nichols' statements. Under that test, the government first had to show that the witness was unavailable; since Nichols was dead, that requirement was met. Pet. App. 4a. The second part of the test required the government to show that the statements were reliable either because they fell within a firmly rooted exception to the hearsay rule, or because they had sufficient guarantees of trustworthiness. *Ibid.* Because Fed. R. Evid. 804(b)(5) is not a traditional hearsay exception, the court of appeals considered whether Nichols' testimony had sufficient guarantees

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[2] Fed. R. Evid. 804(b)(5) provides that a hearsay statement of an unavailable declarant, not specifically covered by another exception in Rule 804, may be admitted if the statement has "equivalent circumstantial guarantees of trustworthiness" and the trial court determines that:

> (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

of trustworthiness. Pet. App. 4a n.3. The court concluded that it did. The court rested that conclusion on several factors, including that Nichols had testified pursuant to an immunity agreement that required him to give truthful testimony; that he had had the opportunity to consult with his counsel during his testimony; that he necessarily understood that the information he gave would be subject to further investigation; and that he would be exposed to a perjury prosecution if he provided false testimony. *Id.* at 5a.

ARGUMENT

1. Petitioner contends (Pet. 13-16) that the admission of Nichols' grand jury testimony pursuant to a residual hearsay exception, Fed. R. Evid. 804(b)(5), was erroneous. He argues that when former testimony fails to satisfy Fed. R. Evid. 804(b)(1), which creates a hearsay exception for former testimony of an unavailable witness, it can never be admitted under the residual exception. That contention lacks merit and does not warrant this Court's review.

Rule 804(b)(5) authorizes the admission of the hearsay statement of an unavailable witness when the statement is "not specifically covered" by another Rule 804(b) exception, but has "equivalent circumstantial guarantees of trustworthiness." Fed. R. Evid. 804(b)(5). The residual exception constitutes a generally applicable basis for the admission of an out-of-court statement of an unavailable witness when the trial court finds, on a case-by-case basis, that the statement is sufficiently reliable and meets the other requirements of the Rule. Nothing in the text of the Rule indicates that if another exception might apply,

but is not satisfied on the particular facts, the residual exception is unavailable.[3]

The courts of appeals have recognized that Rule 804(b)(5) applies to former testimony that fails to satisfy the requirements of Rule 804(b)(1). As the First Circuit has explained, there is no basis for concluding that "the 'potential' availability of one kind of hearsay exception automatically rules out the use of another. After all, normally, hearsay is admissible if it satisfies any one exception." *United States* v. *Doulon*, 909 F.2d 650, 654 (1990) (admitting grand jury testimony pursuant to Rule 804(b)(5)); *United States* v. *Furst*, 886 F.2d 558, 573 (3d Cir. 1989) (Rule 804(b)(5) "is not limited * * * as to types of evidence not addressed in the other exceptions"), cert. denied, 493 U.S. 1062 (1990); *United States* v. *Snyder*, 872 F.2d 1351, 1354-1355 (7th Cir. 1989) (admitting grand jury testimony under residual exception); *United States* v. *Curro*, 847 F.2d 325, 327 (6th Cir.) (same), cert. denied, 488 U.S. 843 (1988); *United States* v. *Carlson*, 547 F.2d 1346, 1353-1355 (8th Cir. 1976) (same), cert. denied, 431 U.S. 914 (1977); cf. *United States* v. *Hitsman*, 604 F.2d 443, 447 (5th Cir. 1979) (statement that failed to satisfy requirements of

[3] The legislative history supports the view that former testimony may be admitted under the residual exception in particular cases. The Senate Committee on the Judiciary justified its inclusion of a residual hearsay exception in part on the basis that "without a separate residual provision, the specifically enumerated exceptions could become tortured beyond any reasonable circumstances which they were intended to include." S. Rep. No. 1277, 93d Cong., 2d Sess. 19 (1974). The residual exception could not function as such a safety valve if courts were precluded from admitting a statement under a residual exception whenever the statement was arguably covered by another exception but failed to satisfy its requirements.

business record exception was admissible under residual exception).

Petitioner errs in contending (Pet. 14-15) that *United States* v. *Thomas*, 919 F.2d 495, 498 (8th Cir. 1990), cert. denied, 111 S. Ct. 2837 (1991), conflicts with those cases. In *Thomas*, the court found that a particular statement failed to satisfy the requirements of the exception in Rule 804(b)(3) for statements against interest, and suggested that, because the residual exception applies only when a statement is not "covered" by another exception, "[i]t would appear" that the residual exception did "not come into play." 919 F.2d at 498.[4] The court held, however, that the proffered statement was inadmissible under the residual exception in any event, because it lacked indications of trustworthiness. *Ibid.* Accordingly, *Thomas* did not reject the potential applicability of Rule 804(b)(5) to trustworthy hearsay.[5]

Nor does the decision in this case conflict with *United States* v. *Salerno*, 112 S. Ct. 2503 (1992). Pet. 13-14, 16. That case did not involve Rule 804(b)(5). Rather, it presented the issue of whether, when a witness asserts his Fifth Amendment privilege at

[4] That reading of Rule 804(b)(5) is incorrect. A statement is "covered" by another exception only if the statement satisfies all of the requirements of that exception. "If a statement does not satisfy all of the requirements of Rule 804(b)(1), then it is not a statement 'covered by [one] of the foregoing exceptions' within the meaning of Rule 804(b)(5)." *United States* v. *Fernandez*, 892 F.2d 976, 981 (11th Cir. 1989), cert. dismissed, 495 U.S. 944 (1990).

[5] The absence of any conflict is underscored by the First Circuit's observation in *United States* v. *Donlon*, 909 F.2d at 654, that "we shall follow all other circuits that have considered this matter and hold that prior grand jury testimony falls within the category of hearsay to which the exception (5), the residual exception, *potentially* applies."

trial, a court may admit the grand jury testimony of that witness against the government pursuant to Fed. R. Evid. 804(b)(1), whether or not the government had a similar motive to cross-examine the witness when the grand jury testimony was given. Applying the requirement in Rule 804(b)(1) that former testimony may be admitted under that exception only "if the party against whom the testimony is now offered * * * had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination," the Court held that a defendant has "no right to introduce * * * [a grand jury witness's] former testimony under Rule 804(b)(1) without showing a 'similar motive.'" 112 S. Ct. at 2507. The Court remanded for the court of appeals to consider whether the government had such a "similar motive" in that case. *Id.* at 2508-2509. *Salerno* holds only that when former testimony is admitted under Rule 804(b)(1), a court may not "ignore" a specific requirement of that provision, 112 S. Ct. at 2508; it does not hold that the residual exception in Rule 804(b)(5) is inapplicable to former testimony that does not satisfy Rule 804(b)(1).

2. Petitioner also contends (Pet. 16-27) that the court of appeals erred in considering, as factors supporting the reliability of Nichols' testimony, that it was given under a grant of immunity and that he was under oath before a grand jury. According to petitioner, the circuits are in conflict over whether those factors support or undercut the reliability of an unavailable declarant's hearsay statements.

Both Rule 804(b)(5) and the Confrontation Clause of the Sixth Amendment require an inquiry into the guarantees of trustworthiness that surround a hearsay statement before the trial court may admit it. Fed. R. Evid. 804(b)(5); *Idaho* v. *Wright*, 110 S. Ct. 3139 (1990). Where, as here, the hearsay statement

does not fall into a recognized hearsay exception, it must have "particularized guarantees of trustworthiness" as a result of the circumstances in which the statement was made. 110 S. Ct. at 3148-3150. Although the Court held in *Wright* that corroborating evidence is not part of the circumstances to be considered, the Court "decline[d] to endorse a mechanical test for determining 'particularized guarantees of trustworthiness' under the [Confrontation] Clause," recognizing that trial courts "have considerable leeway in their consideration of appropriate factors." *Id.* at 3150.

The courts that have considered whether the grand jury testimony of an immunized witness is admissible have properly focused on the particular facts of each case, without applying a "mechanical test." In this case, the court of appeals found that the particular circumstances surrounding Nichols' grand jury testimony gave it "indicia of trustworthiness sufficient for purposes of the Confrontation Clause". Pet. App. 5a. The court explained that Nichols was required by his immunity agreement to give truthful testimony; that his agreement with the government was reached with the advice of counsel, who was available to him throughout his testimony; that Nichols was necessarily aware that his testimony would be subject to investigation by the prosecutor and that his immunity could be revoked if he testified falsely;[6] and that, because his grand jury testimony was given under oath, Nichols would be exposed to a perjury prosecution if he testified falsely. *Ibid.*

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[6] The immunity agreement stated that "[i]f either the United States or Mr. Nichols violates the terms of this agreement, the other party will have the right to void this agreement." C.A. App. 103.

Other courts have applied a similar multi-factor analysis in admitting grand jury testimony (as well as other out-of-court statements), after close examination of the particular facts. See, *e.g.*, *United States* v. *Panzardi-Lespier*, 918 F.2d 313, 316-317 (1st Cir. 1990); *United States* v. *Workman*, 860 F.2d 140, 144-145 (4th Cir. 1988), cert. denied, 489 U.S. 1078 (1989); *United States* v. *Curro*, 847 F.2d 325, 327 (6th Cir.), cert. denied, 488 U.S. 843 (1988); *United States* v. *Doerr*, 886 F.2d 944, 955-958 (7th Cir. 1989); *United States* v. *Carlson*, 547 F.2d 1346, 1352-1360 (8th Cir. 1976), cert. denied, 431 U.S. 914 (1977); *United States* v. *Marchini*, 797 F.2d 759, 764-765 (9th Cir. 1986), cert. denied, 479 U.S. 1085 (1987).[7]

In particular cases, some courts have viewed a witness's entry into an immunity agreement before testifying as a factor cutting against the testimony's reliability.[8] Other courts have found an immunity

[7] Neither this case nor others cited by petitioner (Pet. 23) have viewed the grand jury setting as necessarily supporting a statement's reliability. For example, the portion of *United States* v. *McCall*, 740 F.2d 1331, 1342 (4th Cir. 1984), cited by petitioner (Pet. 23) represented the opinion of only one judge, not the opinion of the court. See 740 F.2d at 1334. In *United States* v. *Carlson*, *supra*, and *United States* v. *Doulon*, *supra*, the grand jury setting was but one of many factors that the courts considered.

[8] See, *e.g.*, *United States* v. *Feldman*, 761 F.2d 380 (7th Cir. 1985) (reversing use of a deposition from a civil case when witness had incentive to protect his financial interest; court noted that immunized testimony could be self-serving); *United States* v. *Gomez-Lemos*, 939 F.2d 326, 330, 333 (6th Cir. 1991) (reversing admission of co-conspirators' grand jury testimony, after witnesses asserted Fifth Amendment privilege at trial; court observed that giving testimony under oath did not guarantee the trustworthiness of the statements, and that a plea agreement might imply that the witness was currying favor with the prosecutor); *United States* v. *Bailey*, 581 F.2d

agreement or the grand jury setting to add little to the reliability of hearsay statements.[9] Still other courts have noted, in passing, the fact that a witness did not have immunity as a circumstance supporting reliability.[10] Those cases do not conflict with this case. No court has established a per se rule that a statement's reliability can never be enhanced by the fact that the statement was given under oath, before a grand jury, or pursuant to an immunity agreement. The particular facts of each case have been paramount.[11] Indeed, even those courts that have suggested that an immunity arrangement may detract from the reliability of a witness's statements have not found that factor alone to bar the admission of the testimony.[12]

341, 350 (3d Cir. 1978) (holding that statement was inadmissible because of lack of reliability, noting that statement was made during plea negotiations and was not made under oath).

[9] See *United States* v. *Fernandez*, 892 F.2d 976, 983 (11th Cir. 1989) (grant of immunity did not add to testimony's reliability), cert. dismissed, 495 U.S. 944 (1990); *United States* v. *Snyder*, 872 F.2d at 1355 (grand jury setting "adds little" to testimony's reliability).

[10] See, *e.g.*, *United States* v. *Donlon*, 909 F.2d at 654 (noting absence of immunity); *United States* v. *Vernor*, 902 F.2d 1182, 1188 (5th Cir.) (discussing a variety of factors including absence of plea agreement or promises from prosecutor), cert. denied, 111 S. Ct. 301 (1990); *United States* v. *Zannino*, 895 F.2d 1, 7 (1st Cir.) (noting absence of immunity), cert. denied, 494 U.S. 1082 (1990).

[11] See *United States* v. *Gonzalez*, 559 F.2d 1271, 1274 (5th Cir. 1977) (Pet. 24) (holding grand jury testimony inadmissible when prosecutor repeatedly threatened witness with contempt; distinguishing *United States* v. *Carlson*, 547 F.2d 1346, 1354 (8th Cir. 1976), cert. denied, 431 U.S. 914 (1977), in which grand jury testimony was admitted).

[12] See *United States* v. *Snyder*, 872 F.2d at 1356 (affirming admission of grand jury testimony; arrangement between

The decisions in this area conform to the rule, recently reaffirmed in *United States* v. *Kladouris*, 964 F.2d 658, 663 (7th Cir. 1992), that any list of relevant factors under Rule 804(b)(5) is neither absolute nor exhaustive, and that each case must be decided on its own particular facts. A single factor, such as an immunity agreement, may take on a different coloration depending on the surrounding circumstances. See *United States* v. *Snyder*, 872 F.2d at 1356 ("[e]very case must be analyzed on its own facts"; that the government had agreed to assist witness was disclosed to jury, thereby mitigating concerns about the impact of that assistance on the statement's reliability).

In this case, Nichols entered into an immunity arrangement and testified before the grand jury with counsel, who could be expected to act as a check against perjury or prosecutorial influence, available to him. Moreover, Nichols had to realize that the government would investigate his statements; if they were false, he could be subjected to prosecution and imprisonment. Finally, Nichols did not repudiate his statements or subsequently assert a Fifth Amendment privilege and refuse to testify. Accordingly, the court of appeals reasonably concluded that Nichols' grand jury testimony bore indicia of reliability warranting its admission. That other courts, under different circumstances, have found immunity agreements to detract from a statement's reliability does

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government and witness was revealed to jury); *United States* v. *Thevis*, 665 F.2d 616, 629 (5th Cir.) (affirming admission of grand jury testimony while observing in dictum that immunity agreement might encourage a witness to embellish his testimony), cert. denied, 456 U.S. 1008 (1982).

not create a conflict warranting this Court's review.[13]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

LOUIS M. FISCHER
Attorney

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[13] Petitioner also suggests (Pet. 27-29) that review is warranted to examine the relationship between the "particularized guarantees of trustworthiness" required for the Confrontation Clause and for Rule 804(b)(5). As this Court and others have recognized, the same considerations are relevant in both contexts. See *Idaho* v. *Wright*, 110 S. Ct. at 3150; *United States* v. *Zannino*, 895 F.2d at 7 (leaving open whether tests are always the same). There is no conflict in the circuits on this issue, and petitioner does not suggest any other reason that would justify its review by this Court.

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No. 92-64

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

LARRY A. TUCKER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

HAMILTON P. FOX, III
(Counsel of Record)
WILLIAM BLUMENTHAL
THOMAS M. DUGARD
SUTHERLAND, ASBILL & BRENNAN
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 383-0100

Counsel for Petitioner

September 24, 1992

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

ARGUMENT

In its Brief in Opposition, the government presents two arguments as to why certiorari is unwarranted in this case. The first argument misses Petitioner's point. The second indirectly supports it.

1. According to the government, Congress and the courts have recognized that former testimony may be admitted under the residual hearsay exception, even if it fails to satisfy the requirements of Fed. R. Evid. 804(b)(1). (Resp. 5-7) The government contends that this Court's decision in *United States v. Salerno*, 112

S. Ct. 2503 (1992), is inapplicable to the issue. (Resp. 7-8) The government evidently misses Petitioner's point about *Salerno*.

The government correctly states that *Salerno* does not explicitly address the application of Rule 804(b)(5) to former testimony. Significantly, though, the Court strictly construed the hearsay exceptions in holding that former testimony may not be admitted under Rule 804(b)(1) if any of the requirements of that rule are not satisfied. The Court recognized that Congress had "made a careful judgment as to what hearsay may come into evidence and what may not." 112 S. Ct. at 2507. To admit former testimony under the residual exception—as the Fourth Circuit did below and as the government urges here—emasculates Rule 804(b)(1) and Congress' careful consideration of it. If the Fourth Circuit's decision is allowed to stand, the rationale of *Salerno* would be rendered meaningless; strict construction of the enumerated hearsay exceptions would readily be subverted by admission under the residual exception.

The cases that the government cites for the proposition that former testimony failing to satisfy the requirements of Rule 804(b)(1) may nonetheless be admitted under Rule 805(b)(5) (Resp. 6-7) are in direct conflict with the rationale of *Salerno*. If these cases state good law, then Rule 804(b)(1) becomes superfluous. Congress did not intend such a result. *See* Fed. R. Evid. 803(24) & 804(b)(5), Judiciary Committee Note, Senate Report No. 93-1277 (1988) ("The residual exceptions are not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions.").

Nor are the circuits in complete accord, as the government implies, that certain former testimony may be admitted under the residual exception when the requirements of Rule 804(b)(1) are not met. The government particularly misreads *United States v. Thomas*, 919 F.2d 495 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 2837 (1991). (Resp. 7) That case involved the admissibility under Rule 804(b)(3) of an earlier statement that was arguably against the unavailable declarant's penal interest. 919 F.2d at 497. The court found that the statement was covered by Rule 804(b)(3), but did not meet the test for admissibility imposed by the Rule. *Id.* at 497-98. It further held that the residual exception "does not come into play unless the proffered statement is 'not specifically covered by any of the foregoing exceptions'." *Id.* at 498. Thus, *Thomas* found that the residual exception was not applicable to forms of hearsay covered by another exception, even though the elements of the other exception might not be satisfied.

As the government notes (Resp. 7 n.4), *Thomas* directly contradicts the Eleventh Circuit's decision in *United States v. Fernandez*, 892 F.2d 976, 981 (11th Cir. 1989), *cert. dismissed*, 495 U.S. 944 (1990), on the applicability of Rule 804(b)(5) when the elements of other hearsay exceptions are not satisfied. Preferring not to characterize the contradiction as a conflict between the circuits, the government dismissively explains simply that *Thomas*'s "reading of Rule 804(b)(5) is incorrect." (Resp. 7 n.4)

The government completely ignores the district court opinion in *United States v. Vigoa*, 656 F. Supp. 1499 (D.N.J. 1987), affirmed by the Third Circuit (without published opinion) at 857 F.2d 1467 (1988),

which clearly held that grand jury testimony can never be admissible under the residual exception. 656 F. Supp. at 1505 & n.7. That court held that " '[W]herever a potential use of hearsay was specifically contemplated and consciously rejected in the Rules' overall design, it would pervert Congress' plan if the residual exceptions were allowed to resurrect that rejected class of hearsay and render it admissible in derogation of its intended exclusion elsewhere in the hearsay rules.' " *Id.* at 1505 (citation omitted). Contrary to the Fourth Circuit below, *Vigoa* held that Rule 804(b)(5) would swallow up Rule 804(b)(1) if grand jury testimony could admitted under the residual exception.

2. Although recognizing that the circuits disagree on whether the existence of an immunity agreement enhances or detracts from the reliability of former testimony, the government finds no conflict—because those courts were simply making fact determinations. (Resp. 8-13) The government argues that courts must look at several factors to determine the trustworthiness of grand jury testimony, as the Fourth Circuit did below.

This argument is problematic in several respects. To start, the trial court in this case never made a factual determination on the record as to the reliability of the testimony at issue. No special hearing was held, and the trial court barely addressed any of the factors relied upon by the Fourth Circuit. Since the trial court neither discussed nor considered the elements of reliability, the Fourth Circuit's opinion must be read as indicating that reliability may be presumed as a matter of law when the enumerated

factors are present. Other courts, however, have found that the same factors are elements of unreliability.

The government does not dispute that courts draw conflicting inferences from identical factors in cases under Rule 804(b)(5). This Court has held that courts have "considerable leeway" in choosing which factors they will consider, *see Idaho v. Wright*, 497 U.S. 805, 110 S. Ct. 3139, 3150 (1990), but, even allowing considerable leeway, has not invited courts to interpret a specific factor, such as a grant of immunity, as enhancing reliability in one case and detracting from it in another.

Almost every case involving an immunized grand jury witness will present the same factors that the Fourth Circuit cited in this case and that the government cites in its Brief in Opposition. (Resp. 8-11) There will always be a grant of immunity. The immunity agreement invariably will require the witness to testify truthfully. The witness will routinely have advice of counsel when entering into the agreement. The prosecutor will routinely investigate the witness' testimony in order to corroborate it and the witness will be advised that the immunity may be revoked if he or she testifies falsely. The witness invariably will be aware that his or her testimony is given under oath. The witness invariably will be subject to prosecution for perjury if he or she testifies falsely. Each of these factors cannot both enhance or detract from reliability, depending on the case or the court. The admissibility of damaging, uncross-examined grand jury testimony cannot be backhanded as a mere fact determination made without reference to legal standards.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

HAMILTON P. FOX, III
(Counsel of Record)
WILLIAM BLUMENTHAL
THOMAS M. DUGARD
SUTHERLAND, ASBILL & BRENNAN
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 383-0100

Counsel for Petitioner

September 24, 1992